No. 84-1503

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHICAGO TEACHERS UNION, LOCAL NO. 1, AFT, *et alia*,

Petitioners,

v.

ANNIE LEE HUDSON, *et alia*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENTS ANNIE LEE HUDSON, K. CELESTE CAMPBELL, ESTHERLENE HOLMES, EDNA ROSE MCCOY, DR. DEBRA ANN PETITAN, WALTER A. SHERRILL, and BEVERLY F. UNDERWOOD

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23 September 1985

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Does a governmental agency deprive its nonunion public employees of procedural due process of law where, pursuant to an agreement between it and the union acting as the employees' exclusive representative, it:

(i) garnishes their wages in satisfaction of the union's unproven claim that those garnishments represent proper payments for the union's "collective-bargaining" services to the employees; and

(ii) immediately transfers the garnishments to the union, knowing that the union will require the employees to pursue its internal scheme of arbitration, or prosecute an independent civil action in state court, to recover any part of the disputed monies?

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Respondents Annie Lee Hudson, K. Celeste Campbell, Estherlene Holmes, Edna Rose McCoy, Dr. Debra Ann Petitan, Walter A. Sherrill, and Beverly F. Underwood submit this brief in opposition to the brief filed on behalf of petitioners Chicago Teachers Union, Local No. 1, *et alia*, and of the Board of Education of the City of Chicago and other respondents supporting petitioners.[1] Because of the parties' peculiar alignments, this brief will designate respondents Annie Lee Hudson, *et alia*, as "the teachers", petitioners collectively as "CTU", and respondents supporting petitioners collectively as "the Board".

[1] *See* Brief for the Chicago Teachers Union, Local No. 1, et al., Petitioners, and for the Board of Education of the City of Chicago, et al., Respondents Supporting Petitioners ("CTU/Bd Br."), at 1-2 & n.1.

COUNTERSTATEMENT OF THE FACTS

The teachers accept the Board's and CTU's statement of the facts, with three exceptions. First, the record contains no proof that, "[d]uring the period 1967 through November, 1982", or at any time thereafter, "every employee in the bargaining unit", including the teachers, "received all the benefits of the CTU-Board of Education collective bargaining agreement and its administration by [CTU]".[2] Neither does the record establish that any supposed "benefits" the "collective bargaining agreement and its administration" actually conferred on some or all "employees in the bargaining unit" were such *constitutionally sanctioned* "collective-bargaining benefits" as might support imposition of a "proportionate-share payment" on nonunion employees under the *Abood* doctrine.[3]

Second, contrary to the Board's and CTU's implication, the District Court's statement that CTU "carefully documented its calculation of the fair share fee" constitutes no finding that that "calculation" determined a constitutionally permissible "fee", merely the observation that CTU explained how arithmetically it arrived at the "fee" it claimed.[4] Because CTU's method for calculating the "fee" was constitutionally improper, its supposed "car[e]" in "document[ing] its calculation" proves nothing.[5]

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[2] *Pace id.* at 3.

[3] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977). Under the former Illinois law at issue here, a "proportionate-share payment" was analogous to the Michigan "agency fee" at issue in *Abood*, and to the "fair-share fees" other States' public-employment labor-relations acts impose. The present Illinois law designates these charges "fair-share fees". *See* CTU/Bd Br. at 3 & n.2.

[4] *Pace* CTU/Bd Br. at 4.

[5] *Post*, pp. 27-29, 36-38. Moreover, in as much as the Board and CTU integrated the latter's "calculation" within a fatally unconstitutional wage-garnishment procedure, the "calculation's" substantive demerits are irrelevant.

Third, the Board and CTU wrongly suggest that five teachers are entitled to no relief because "[t]he district court concluded that * * * they had not protested the fee to CTU", "[t]he court of appeals did not disturb the district court's ruling in this regard", and "these five have not cross-petitioned to seek review of that ruling".[6] The Court of Appeals held that "[n]one of the [teachers] followed the prescribed [CTU] procedure through to the end (some did not invoke it at all), *but that is unimportant if the procedure violates their constitutional rights*"[7]—which, of course, the Court of Appeals found. Moreover, as this Court held in an analogous context, complainants such as the teachers may present their *first* "protest" of a union's claim for a "proportionate-share payment" in a court complaint.[8]

SUMMARY OF THE ARGUMENT

Contrary to the miscnaracterization of the Board and CTU, the issue here is what procedures the Due Process Clause of the Fourteenth Amendment requires for initial validation and collection of "proportionate-share payments" from the teachers, even if the ultimate judicial determination is that those payments satisfy the substantive requirements of the First Amendment as proper compensation for CTU's "collective-bargaining" activities on the teachers' behalf. Indeed, far from framing a First-Amendment issue, the facts present the paradigmatic procedural-due-process situation, in which an alleged private creditor (CTU) invokes the power of a governmental agency (the Board) to seize property (the unrestricted possession and use of wages) from alleged private debtors (the teachers) under color of an untested claim of right arising from the creditor's supposed provision of services

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[6] CTU/Bd Br. at 6 n.6.

[7] Hudson v. Local No. 1, CTU, 743 F.2d 1187, 1194 (7th Cir. 1984) (emphasis supplied).

[8] BRAC v. Allen, 373 U.S. 113, 119 n.6 (1963).

to the debtors.

In this context, the applicable precedents are not *Abood*, *Ellis*, or this Court's related decisions dealing with the substantive First-Amendment aspects of "proportionate-share-payment" schemes,[9] but instead this Court's long line of procedural-due-process opinions, stretching from *Sniadach* through *Hudson* v. *Palmer*.[10] And, applied here, the latter decisions compel the conclusion that the wage-garnishment scheme the Board and CTU have implemented violates the Due Process Clause because:

1. No extraordinary governmental interest requires *pre*-hearing seizure of the teachers' wages.

2. No competent administrative or judicial official evaluates the need for *pre*-hearing seizures, or scrutinizes the validity of CTU's claims.

3. No statute or regulation requires CTU to establish even the probable validity of its claims prior to seizure of the wages.

4. State law does not mandate an early administrative or judicial hearing on the propriety of the seizures.

5. No safeguards prevent CTU's abuse of the "proportionate-share system" for its own private gain.

6. CTU has no perfected *pre*-seizure legal interest in the wages, only an abstract claim to some indeterminate portion of them.

7. What constitutes CTU's "collective-bargaining" expenses is a complex question of fact and law.

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[9] Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Ellis v. BRAC, ___ U.S. ___, 104 S. Ct. 1883 (1984); and cases cited therein.

[10] Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Hudson v. Palmer, ___ U.S. ___, 104 S. Ct. 3194 (1984). The teachers catalogue and apply these decisions *post*, pp. 14-26.

8. The teachers lack access to the evidence that supports, or confutes, CTU's claims.

9. No neutral government official immediately reviews the amount of the seizures.

10. State law provides no damages or attorneys' fees in the event of wrongful seizures. And,

11. The seizures occur pursuant to an established state procedure, under circumstances in which the government could, but does not, provide adequate *pre*-deprivation process, instead relegating the teachers to a *post*-deprivation state-court civil action.

For these reasons, the Court of Appeals correctly condemned the "proportionate-share-payment" scheme as violating procedural due process.

ARGUMENT

I. Contrary to the Board's and CTU's mischaracterization, the issue in this case is, not what substantive limitations the First Amendment imposes on CTU's ultimate use of "proportionate-share payments", but rather what procedural protections the Due Process Clause of the Fourteenth Amendment requires in the validation of those payments prior to the Board's seizure of them.

The Board and CTU disingenuously argue that the teachers and the Court of Appeals have attempted effectively to reverse the substantive First-Amendment doctrine this Court enunciated in *Abood* and related decisions. Nothing could be less true. Both the teachers and the Court of Appeals accepted the substantive teaching of *Abood* that a State may require nonunion public employees to reimburse their exclusive collective-bargaining representative for services it renders to them in that capacity, without abridging their First-Amendment rights. What the teachers challenged and the Court of Appeals held unconstitutional under the Due Process Clause of the

Fourteenth Amendment is *the procedure* the Board and CTU jointly implemented to collect "proportionate-share payments".

Neither the teachers nor the Court of Appeals denied that CTU may be entitled to some "proportionate-share payments". But the teachers did (and here continue to) deny (with the Court of Appeals' support) that, whatever the size of these payments may prove to be, the Board may constitutionally collect them by mechanically garnishing the teachers' wages at CTU's unilateral demand and straightaway transferring the monies to CTU without a prior hearing before a governmental body on the merits of CTU's claim and the teachers' defenses.

Thus, the issue here is what procedures the Fourteenth Amendment requires for initial validation and collection of a "proportionate-share payment", even where a court ultimately concludes that that payment substantively satisfies the First Amendment. And the studied mischaracterization of the issue by the Board and CTU strikingly illuminates their inability coherently to defend the conduct the teachers challenged and the Court of Appeals ruled unconstitutional.

A. Because the arrangement for "proportionate-share payments" amounts to a scheme for garnishment by the government (the Board) of the wages of alleged debtors (the teachers) at the unilateral demand of an alleged creditor (CTU), and immediate transfer of those monies to the latter without a prior hearing on the merits of either its claims or the teachers' defenses, the arrangement raises serious procedural-due-process questions, even if CTU could ultimately establish its right to the monies in their entirety.

Operationally, this case involves the archtypical procedural-due-process situation, wherein an alleged private creditor invokes state power to seize property from an

alleged private debtor under color of some untested claim of right arising from the creditor's supposed provision of services or tangible goods to the debtor.

Under color of Illinois law,[11] in their collective-bargaining agreement the Board (a governmental agency) and CTU (an alleged private creditor) agreed to impose on the teachers (alleged private debtors) definite monetary liabilities ("proportionate-share payments") to compensate CTU for services it claimed it had rendered or would render as the teachers' exclusive representative. The Board and CTU also agreed to collect this alleged debt by having the Board mechanically garnish the teachers' wages and transfer the monies directly to CTU, without any governmental investigation of the merits of CTU's claims or the teachers' defenses. As a matter of its own discretion, and long after this litigation began, CTU then segregated the payments in what it labelled an "escrow" account, pending either: (i) the teachers' submission of their objections to CTU's hand-picked arbitrator, with whatever subsequent judicial review of his decision Illinois law might allow; or (ii) the teachers' initiation of an independent state-court civil action sounding in tort.[12]

In so far as this case differs from the paradigmatic procedural-due-process situation, its differences exacerbate the problems involved. First, the constitutionally proper "proportionate-share payments" due CTU from the teachers are unknown. In the typical debtor-creditor case, the debt is both fixed and known, either because the debtor voluntarily contracts it with the creditor, as evidenced by a promissory note, a conditional-sales agree-

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[11] Or, as the Board and CTU say, "paralleling the Illinois law". CTU/Bd Br. at 4.

[12] As the Board and CTU admit, CTU "began voluntarily placing in escrow the [teachers'] proportionate share payments" only just "[b]efore the case reached the court of appeals", and only then "amended its procedure for collecting proportionate share payments to include an escrow provision". CTU/Bd Br. at 7.

ment, or some similar instrument; or because the debtor willingly accepts tangible goods or services from the creditor, as evidenced by readings on a gas or electric utility-meter, or some similar objective measure. Here, distinguishably, although Illinois statute purported to set the "proportionate-share payments",[13] the teachers' lawful indebtedness depends on two unknowns: (i) what alleged "services" CTU provided as the teachers' exclusive representative; and (ii) whether these "services" satisfy the First Amendment as "collective-bargaining" activities.[14] Thus, CTU has only an *abstract and inchoate* statutory claim to "proportionate-share payments", for the perfection of which in the face of the teachers' challenge it bears the burden of proving—but has yet to prove—what specific "services" it provided as their exclusive representative, whether these "services" satisfied the constitutional "collective-bargaining" standard, what the costs of the "services" were, and what constituted a proper allocation of their costs to individual employees.[15]

Second, because the constitutionally proper "proportionate-share payments" are unknown, the weight of CTU's alleged property-interest in the teachers' wages is indeterminate. In the typical debtor-creditor case, the property subject to seizure (be it money loaned, an apartment rented, or some consumer good furnished) was originally the creditor's undisputed, unencumbered property. The debtor obtained possession and use of it only conditionally, by agreeing to pay principal and interest, rent, or installments. Invoking state power to seize the property from the debtor, the creditor asserts a failure of the condition upon which the debtor's possession depends and a pre-existent right of reversion of possession to the creditor (or a right of the government to hold the property *pendente lite* on his behalf). And the key fact justifying seizure is that the debtor has violated the conditions of continued possession as against the original owner. Here, distinguishably, the wages the Board garnished indisputably were earned by and initially belonged exclusively to the teachers. Illinois law licensed the Board and CTU formally to encumber these wages through the Board's agreement with CTU's unilateral claim to "proportionate-share payments". But the maturation of this claim sufficient to justify the conclusion that CTU has a property-interest substantial enough to support governmental seizure of a determinate part of the wages depends upon CTU's satisfaction of the necessary evidentiary conditions precedent as to the identities of the "services" it provided, their "collective-bargaining" character, their costs, and so on. Absent such evidence, the weight of CTU's entitlement is conjectural, even spectral; whereas, the weight of the teachers' entitlement to what their own labor has earned is clear.

Third and last, although how CTU intends to spend the "proportionate-share payments" determines the constitutionality of its entitlement to them, the propriety of that use is irrelevant to the teachers' right to procedural due process in the initial seizure. In the typical debtor-creditor case, *ceteris paribus* the use the creditor makes of the

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[13] The definitions of allowable "proportionate-share" or "fair share" payments are patently defective in both the original and the amended Illinois laws. The former "measured" a "proportionate-share payment" by "the amount of dues uniformly required by [*sic*, no doubt 'of' was intended] members [of the exclusive representative]". Ill. Rev. Stat., ch. 122, § 10-22.40(a) (1983). Under the latter, a "fair-share fee" must neither "exceed the dues uniformly required of members [of the exclusive representative]" nor "include any fees for contributions related to the election or support of any candidate for political office". Ill. Stat. Ann., ch. 48, ¶ 1711 (Smith-Hurd 1984 Supp.). Yet, although rare cases may satisfy these criteria, generally (as is judicially noticeable) unions do *not* expend *all* of their dues-incomes, or all of those incomes less only their "contributions related to the election or support of * * * candidate[s] for political office", on activities properly categorizable as "collective bargaining" in a labor-relations, let alone the constitutional, sense. *See, e.g.*, Local 1625, Retail Clerks v. Schermerhorn, 373 U.S. 746, 753-54 & n.6 (1963).

[14] *Compare* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), *with* Ellis v. BRAC, ___ U.S. ___, 104 S. Ct. 1883 (1984).

[15] CTU has never disclosed whatever proofs it may have concerning these matters. *See ante*, p. 2, and *post*, pp. 27-29.

property seized from the debtor is irrelevant; for the property in dispute was originally the creditor's to employ as he willed, and came into and could remain in the debtor's possession only upon his fulfillment of the creditor's conditions. Here, distinguishably, CTU is entitled to "proportionate-share payments" only if it spends those monies on constitutional "collective-bargaining" activities it performs as the teachers' exclusive representative. Thus, CTU's intended use of the monies is material to the size of the debt. Yet, even if CTU could ultimately show that this use were entirely "collective-bargaining" in character, the teachers would nevertheless be entitled to the same measure of procedural due process obtaining in the typical debtor-creditor situation where use is not a substantive issue.[16]

In sum, operationally this case presents the paradigmatic debtor-creditor-government procedural-due-process situation, aggravated from the debtors' (the teachers') perspective by the indeterminacy of the alleged debt, the speculative weight of the creditor's (CTU's) interest, and the absence of proof as to CTU's actual expenditures.

B. The Board's and CTU's studied mischaracterization of this case as involving the legitimacy of CTU's ultimate use of "proportionate-share payments", rather than the propriety of the procedures the government employs for establishing the validity of those payments prior to seizing or transferring them to CTU, exposes the Board's and CTU's impotence to defend the wage-garnishment scheme against procedural-due-process attack.

The compelling obviousness of the procedural-due-process issue before this Court exposes the Board's and CTU's brief as a coldly calculated study in misrepresentation designed to cloak their inability to muster even a colorable defense for their wage-garnishment scheme.

[16] *See* Carey v. Piphus, 435 U.S. 247, 266 (1978) (property-owner has "absolute" right to procedural due process, even if he suffers no "other actual injury" than loss of the property and that loss is "justified").

Admitting that "the question posed here is one of constitutional *procedure*", the Board and CTU then sidestep that issue: first, by pretending that "to answer [the latter] question it is necessary first to understand the *substantive* constitutional rights that are implicated"; and then by claiming that, because the teachers' supposedly sole constitutional complaint is against CTU's impermissible *use* of the "proportionate-share payments", and because CTU as a matter of grace has chosen to "escrow" those payments pending the outcome of some judicial hearing the teachers must initiate in the future, therefore the Board's *pre*-hearing garnishment of their wages and transfer of the monies to CTU is constitutionally faultless.[17] Thus, the Board and CTU contend, "the collection of proportionate share payments from [the teachers] does not, in and of itself, raise constitutional questions"—supposedly because the "application" of "the procedural component of the Due Process Clause * * * is triggered by the existence of the objector's First Amendment right to be free from providing 'compulsory subsidization of ideological activity'", which right CTU's "escrow" supposedly protects from abridgment.[18]

In essence, as far as the teachers' wages are concerned, the Board and CTU simply excise from the Fourteenth Amendment the never-before-questioned principle that a State may not deprive any person of the possession, use, or ownership of property without due process of law, no matter how the recipient of that property intends to use it. For, according to them: (i) if some court eventually finds

[17] CTU/Bd Br. at 8-10 (emphasis supplied).

[18] *Id.* at 16-17. In a footnote, they go even further to assert that, "[b]ecause the Board of Education's only involvement in the proportionate-share payment system is to participate in the collection of those payments which, in and of itself, does not raise a constitutional issue, the claim against the Board is of the most attenuated kind". *Id.* at 16 n.10.

CTU entitled to *any part* of the garnished wages to recompense it for "collective-bargaining" activities, then as to *all* of the garnishments "the collection does not * * * raise constitutional questions"; (ii) even if the court finds CTU entitled to *no part* of the seized wages, nevertheless the constitutionality of "the collection" is still faultless; and, indeed, (iii) the teachers may not even complain of any procedure the Board and CTU employ to siphon off any (or perhaps even all) of the teachers' wages to subsidize *any* expenditure of CTU on "non-political, non-ideological activity"![19]

Not surprisingly, the Board and CTU support their extraordinary thesis with not a single procedural-due-process decision of this Court that sanctions, or that they even claim sanctions, a seizure of property similar to that in issue here. Rather, they leap from the holdings of *Abood*, *Ellis*, and earlier related cases—that the First and Fourteenth Amendments *impose substantive limitations*

[19] *See id.* at 15 n.9, where they attempt to turn *Abood* and *Ellis* upside-down. These cases held that compelling nonunion employees to pay "fair-share fees" is constitutional because of the governmental interest in supporting "collective bargaining", notwithstanding the ideological nature of such bargaining; whereas, the use of such fees to subsidize other, non-bargaining ideological activities (such as political campaigns) is unconstitutional. The results in *Abood* and *Ellis* turned on the "collective-bargaining" nature of the activities subsidized, not on their non-ideological character. The Board and CTU, however, misinterpret these decisions as teaching that dissenters may be compelled to subsidize *any* union activity, *even if it has no rational relation to "collective bargaining"*, so long as it is "non-political" or "non-ideological". Thus, according to them, the Board could agree with CTU to pay the teachers' wages directly to CTU's officials, for such "non-political, non-ideological" activity as vacationing in the Caribbean, shopping at Tiffany's, or dining at Jean Pierre of Watergate! Their error is patent: The governmental interest that this Court says justifies forced payment of "fair-share fees" is *not* an interest in defraying the expenses of unions *simpliciter*, even if those expenses be "non-political" or "non-ideological", but only an interest in reimbursing unions for demonstrably *"collective-bargaining" services* they actually provide in their capacities as employees' exclusive representatives. This Court has never held that any other interest subtends assessments of "fair-share fees".

on the uses of monies unions may compel dissenting employees to pay under color of "fair-share-fee" arrangements—to the amazing conclusion that therefore the Due Process Clause *permits procedural license* in "the collection" of such monies. Where any opinion written in those cases, or any brief the various parties submitted, decides, addresses, or even raises a procedural-due-process issue they do not say—because, of course, they can not. For *Abood*, *Ellis*, and the other cases dealt solely with challenges to certain of the unions' *expenditures* of dissenting employees' "fair-share" monies, not to the *procedures for collecting* those monies. For example, the language in *Ellis* concerning "advance reduction of dues and/or interest-bearing escrow accounts" on which the Board and CTU disingenuously focus refers to judicial remedies designed to prevent a union from imposing *substantive* harm on objecting employees by "commit[ting] dissenters' funds to improper uses even temporarily".[20] Nothing in *Ellis* sanctions CTU's, or any, "advance reduction of dues" or "interest-bearing escrow accoun[t]" as within the *procedural-due-process* strictures of the Fourteenth Amendment—if only for the simple reason that neither of these alternatives addresses the key procedural-due-process question of whether a hearing should proceed, or may follow, seizure of disputed property.[21]

The old adage counsels, "If you can't win on the law, argue the facts; if you can't win on the facts, argue the law!" Unable to prevail on either the law or the facts of this case, the Board and CTU have decided to argue an imaginary case, to which this Court's leading procedural-due-process decisions are irrelevant. Such a devious course may spare them the embarrassment of frankly con-

[20] Ellis, ____U.S. at ____, 104 S. Ct. at 1890, *quoted in* CTU/Bd Br. at 19. *See also* IAM v. Street, 367 U.S. 740, 771 (1961) (emphasis supplied): "Restraining the collection of all funds from [the exclusive representatives] sweeps too broadly, since [the employees'] objection is *only* to the *uses* to which *some* of their money is put."

[21] *See post*, pp. 14-26.

ceding what they cannot disprove: namely, the procedural invalidity of their wage-garnishment scheme. But even *sotto voce* it unmistakably bespeaks the bankruptcy of their position.

II. Application of the procedural-due-process principles in this Court's decisions from *Sniadach* v. *Family Finance Corporation* through *Hudson* v. *Palmer* condemns the instant arrangement for collecting "proportionate-share payments" as patently unconstitutional.

Although the Board and CTU remain suspiciously reticent about the procedural-due-process principles applicable here, this Court's precedents loudly and consistently condemn as unconstitutional every aspect of the challenged wage-garnishment scheme.

A. Absent extraordinary circumstances, the government denies an alleged debtor due process of law if, pursuant to an established state procedure, it deprives him of the use of property by seizing that property at the unilateral and unsubstantiated demand of an alleged creditor.

Contrary to the Board's and CTU's pretense that the "application" of procedural-due-process considerations must be "triggered by the existence of the objector's First Amendment right to be free from providing 'compulsory subsidization of ideological activity'", this Court has repeatedly applied the Due Process Clause to seizures of property wholly unrelated to First-Amendment freedoms, but which parallel the wage-garnishment scheme involved here.[22]

"Minimum procedural safeguards", this Court has reiterated, include "notice detailing the reasons for a proposed [deprivation of property]"[23] and a *pre*-deprivation hearing.[24] These requirements do not depend on the property constituting "absolute 'necessities' of life",[25] and are not diluted because the property-holder's right arises from state law,[26] because the ownership of the property is disputed,[27] because the property-holder's interest in possession and use is arguably not "weighty",[28] because the property-holder cannot show that he "will surely prevail at [a] hearing",[29] or even because he suffers no "actual injury" other than the dispossession itself.[30] Indeed, this Court "ha[s] described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he be deprived of any significant property interest'".[31]

To be sure, this Court has countenanced some *pre*-hearing seizures of property—but, in those "extraordinary", "truly unusual", and "limited" instances, the seizures were "directly necessary to secure an important governmental or general public interest"; there was "a special need for very prompt action"; and "the State has

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[22] *Pace* CTU/Bd Br. at 16-17.

[23] Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970).

[24] Fuentes v. Shevin, 407 U.S. 67, 88-89 (1972) (citing numerous cases).

[25] *Id.* at 88-90, *cited with approval in* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 608 (1975). *Accord*, Mathews v. Eldridge, 424 U.S. 319, 325-26 (1976), *citing* Fuentes, 407 U.S. at 88-89, *and* Bell v. Burson, 402 U.S. 535, 539 (1971).

[26] Logan v. Zimmerman Brush Co., 455 U.S. 422, 431-32 (1982). Thus, the Board and CTU may not contend that, because the teachers' entitlements to their wages derive from Illinois law, therefore they must accept whatever procedure for "proportionate-share payments" the Illinois Legislature permits.

[27] Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 11-12 (1978), *citing* Fuentes, 407 U.S. at 86.

[28] Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972). When a state law deprives a person of property, the Due Process Clause applies even though the deprivation may not be "grievous". Goss v. Lopez, 419 U.S. 565, 576 (1975).

[29] Fuentes, 407 U.S. at 87.

[30] *See* Carey v. Piphus, 435 U.S. 247, 266 (1978).

[31] Cleveland Bd. of Educ. v. Loudermill, ___ U.S. ___, ___, 105 S. Ct. 1487, 1493 (1985) (footnote omitted; emphasis retained), *quoting* Boddie v. Connecticut, 410 U.S. 371, 379 (1971).

kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance".[32] Furthermore, in such cases, the Court "relied upon the extent to which [the governmental] interest [would] be *frustrated* by the delay necessitated by a prior hearing".[33]

Absent the "'necessity of quick action by the State or the impracticality of providing any predeprivation process'", however, this Court's decisions teach that "a post-deprivation hearing [is] constitutionally inadequate"—a teaching that is "particularly true where, as here, the State's only post-[deprivation] process comes in the form of an independent tort action".[34]

For an early example, *Sniadach* v. *Family Finance Corp.*[35] overturned a Wisconsin wage-garnishment statute. "[T]he clerk of the court issues the summons at the request of the creditor's lawyer", the Court explained;

> [a]nd it is the latter who by serving the garnishee sets in motion the machinery whereby the wages are frozen. They may, it is true, be unfrozen if the trial of the main suit is ever had and the wage earner wins on the merits. But in the interim the wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have, whether it be fraud or otherwise.
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> * * * [I]n the present case no situation requiring special protection to a state or creditor interest is presented by the facts; nor is the * * * statute narrowly drawn to meet

[32] Fuentes, 407 U.S. at 90-91.

[33] Mackey v. Montrym, 443 U.S. 1, 25-26 (1979) (Stewart, J., dissenting) (emphasis supplied).

[34] Logan, 455 U.S. at 436 (footnote omitted).

[35] 395 U.S. 337 (1969).

> any such unusual condition.[36]

Concurring, Justice Harlan reiterated the basic rule that "due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use".[37]

Then, *Fuentes* v. *Shevin*[38] declared certain Florida and Pennsylvania replevin-statutes unconstitutional on similar grounds. "There is no requirement" in the Florida statute, the Court noted,

> that the applicant make a convincing showing before the seizure that the goods are, in fact, "wrongfully detained." Rather, Florida law automatically relies on the bare assertion of the party seeking the writ that he is entitled to one and allows a court clerk to issue the writ summarily. It requires only that the applicant file a complaint, initiating a court action for repossession * * * and that he file a security bond * * * . On the sole basis of the complaint and bond, a writ is issued * * * .
>
> Thus, at the same moment that the defendant receives the complaint seeking repossession of property through court action, the property is seized from him. He is provided no prior notice and allowed no opportunity whatever to challenge the issuance of the writ. *After* the property has been seized, he will eventually have an opportunity for a hearing, as the defendant in the trial of the court action for repossession, which the plaintiff is required to pursue.
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> * * * *
>
> [T]he Pennsylvania law does not require that there *ever* be opportunity for a hearing on the merits of the conflicting claims to possession of the replevied property. The party

[36] *Id.* at 338-39 (footnotes omitted).

[37] *Id.* at 343 (separate opinion) (emphasis retained).

[38] 407 U.S. 67 (1972).

> seeking the writ is not obliged to initiate a court action for repossession. Indeed, he need not even formally allege that he is lawfully entitled to the property. * * * If the party who loses property * * * is to get even a post-seizure hearing, he must initiate a lawsuit himself.

Turning to the question of whether the statutes "are constitutionally defective in failing to provide for hearings 'at a meaningful time'", the Court emphasized that "neither * * * statute provides for notice or an opportunity to be heard *before* the seizure". A prior hearing, the Court explained, "minimize[s] substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party". Therefore, the Court ruled,

> the right to notice and a hearing * * * must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken * * * . Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking * * * has already occurred.

Although the statutes imposed various requirements on the creditor, the Court made clear that

> those requirements are hardly a substitute for a prior hearing, for they test no more than the strength of the applicant's own belief in his rights. Since his private gain is at stake, the danger is all too great that his confidence in his cause will be misplaced. * * * Because of the understandable, self-interested fallibility of litigants, a court does not decide a dispute until it has had an opportunity to hear both sides—and does not generally take even tentative action until it has itself examined the support for the plaintiff's position. The Florida and Pennsylvania statutes do not even require the official issuing a writ of replevin to do that much.

Concluding, the Court found that the broadly drawn statutes "serve no * * * important governmental or general public interest" requiring immediate action, such as "furthering a war effort or protecting the public health". Instead, "[t]hey allow summary seizure * * * when no more than private gain is directly at stake". Moreover,

> [t]he statutes * * * abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to [seize] goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark.[39]

Similarly, *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.* struck down a Georgia garnishment-scheme because the statute lacked the necessary "saving characteristics":

> The writ of garnishment is issuable on the affidavit of the creditor or his attorney, and the latter need not have personal knowledge of the facts. * * * The affidavit * * * need contain only conclusory allegations. The writ is issuable * * * by the court clerk, without participation by a judge. Upon service of the writ, the debtor is deprived of the use of the property * * * . There is no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment.[40]

Together, then, *Sniadach*, *Fuentes*, and *North Georgia Finishing* teach that a seizure of property without a prior hearing is unconstitutional where: (i) no extraordinary circumstances compel immediate action to protect a substantial governmental interest; (ii) no state official (in par-

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[39] *Id.* at 73-78, 80, 80-81, 81-82, 83, 92-93, 93 (footnotes omitted).

[40] 419 U.S. 601, 607 (1975).

ticular, a judge) participates in the decision to initiate the seizure, reviews the factual and legal bases of the creditor's claim, or evaluates the need for a *pre*-hearing seizure; (iii) no statutory provision requires the creditor to establish the probable validity of his claim, to make a convincing factual showing, or even to present some evidence beyond mere assertions, conclusory allegations, or hearsay; (iv) no mandate exists for an early hearing; and (v) no safeguards protect against abuse of the system by self-interested parties seeking private gain.

Where this Court has sustained seizures of property without a prior adversary hearing, the statutes in issue incorporated procedures within the rule of *Sniadach*, *Fuentes*, and *North Georgia Finishing*. For example, *Mitchell* v. *W.T. Grant Co.*,[41] a case antedating *North Georgia Finishing* and explicitly distinguished therein,[42] sustained a Louisiana sequestration-statute that permitted a *pre*-hearing seizure. But, as the Court noted, "the property sequestered * * * is [not] exclusively the property of the * * * debtor"; "both seller and buyer had current, real interests in the property", the former through a vendor's lien. Furthermore,

> [t]he writ * * * will not issue on the conclusory allegation of ownership or possessory rights * * * [but] "only when the nature of the claim and the amount thereof * * * and the grounds relied upon for the issuance of the writ clearly appear from specific facts" shown by a verified petition or affidavit. * * * [T]he clear showing required must be made to a judge, and the writ will issue only upon his authorization and only after the creditor seeking the writ has filed a sufficient bond.
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> * * * *
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> [T]he statute entitles the debtor immediately to seek dissolution of the writ, which must be ordered unless the creditor "proves the grounds upon which the writ was issued," * * * failing which the court may * * * assess damages in favor of the debtor, including attorney's fees.[43]

[41] 416 U.S. 600 (1974).

[42] 419 U.S. at 606-07.

Concurring, Justice Powell emphasized that the statute required the creditor to "make a specific factual showing before a neutral officer or magistrate of probable cause to believe that he is entitled to the relief requested".[44] And the Court characterized the factual issues involved—such as "existence of the debt, the lien, and the delinquency"—as "ordinarily uncomplicated matters that lend themselves to documentary proof".[45] In addition, the Court catalogued how the circumstances in *Mitchell* differed materially from those in *Sniadach* and *Fuentes*.[46]

[43] 416 U.S. at 604, 605-06 (footnotes omitted).

[44] *Id.* at 625 (separate opinion). He then went on to distinguish *Fuentes* on the basis that the "statutes [in that case] * * * did not require an applicant * * * to make any factually convincing showing", and did not mandate a prompt adversary hearing with the burden of proof on the creditor. *Id.* at 625-27 & n.1.

[45] *Id.* at 609.

[46] *Id.* at 614-18 (footnotes omitted):

> In *Sniadach*, the Court * * * observed that garnishment was subject to abuse of creditors without valid claims, a risk minimized by the nature of the security interest here at stake and the protections to the debtor offered by Louisiana procedure. Nor was it apparent in *Sniadach* with what speed the debtor could challenge the validity of the garnishment, and obviously the creditor's claim could not rest on the danger of destruction of wages, the property seized, since their availability to satisfy the debt remained within the power of the debtor who could simply leave his job. The suing creditor in *Sniadach* had no prior interest in the property attached * * *.
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> * * * *
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> The Florida law * * * in *Fuentes* authorized repossession of the sold goods without judicial order, approval, or participation. A writ of replevin * * * was issued by the court clerk. As the Florida law was perceived by the Court, "[t]here is no requirement that the applicant make a convincing showing before the seizure," * * * the law required only "the bare assertion of the party seeking the writ that he is entitled to one" as a condition to the clerk's issuance of the writ. * * * The Pennsyl-

More recently, *Mathews* v. *Eldridge* held that a hearing was not constitutionally required prior to the termination of certain governmental benefits because of the "fairness and reliability of the existing pretermination procedures".[47] Describing how "a medical assessment * * * is required", the Court noted that "[t]his is a * * * sharply focused and easily documented decision", not involving "a wide variety of information [that] may be deemed relevant" or "issues of witness credibility and veracity [that] often are critical to the decisionmaking process". Rather, "the decision * * * will turn, in most cases, upon 'routine, standard, and unbiased medical reports by physician specialists'". Moreover, a "detailed questionnaire which the state agency periodically sends the recipient identifies with particularity the information relevant to the * * * decision". And "[a] further safeguard against mistake is the policy of allowing the * * * recipient's representative full access to all information relied upon by the state agency".[48]

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vania law was considered to be essentially the same * * * except that it did "not require that there *ever* be opportunity for a hearing on the merits of the conflicting claims to possession of the replevied property." * * * The party seeking the writ was not obliged to initiate a court action * * * .

The Louisiana sequestration statute * * * mandates a considerably different procedure. * * * [B]are conclusory claims of ownership or lien will not suffice under the Louisiana statute. * * * [T]he requisite showing must be made to a judge, and judicial authorization obtained. * * * The Louisiana law provides for judicial control of the process from beginning to end. This control * * * is buttressed by the provision that should the writ be dissolved there are "damages for the wrongful issuance of a writ" and for attorney's fees * * * .

* * * In Louisiana, * * * the facts relevant to obtaining a writ of sequestration are narrowly confined. * * * [D]ocumentary proof is particularly suited for questions of the existence of a vendor's lien and the issue of default. There is thus far less danger here that the seizure will be mistaken and a corresponding decrease in the utility of an adversary hearing which will be immediately available in any event.

[47] 424 U.S. 319, 343 (1976).

[48] *Id.* at 343-44, 345, 345-46.

Finally, *Mackey* v. *Montrym* held that, "when prompt postdeprivation review is available for correction of administrative error", "predeprivation procedures" need only "be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be".[49] The "predeprivation procedures" were "reasonably reliable" in the Court's view because they involved "objective facts either within the personal knowledge of an impartial government official or readily ascertainable by him"; "the risk of erroneous observation or deliberate misrepresentation of the facts by the reporting officer in the ordinary case seem[ed] small"; and "there will rarely be any genuine dispute as to the * * * facts". Moreover, the aggrieved individual could receive "immediat[e]" "independent review * * * by a detached public officer", which "should suffice in the ordinary case to minimize the only type of error that could be corrected by something less than [a full] evidentiary hearing".[50]

In sum, rather than questioning or qualifying the rule of *Sniadach*, *Fuentes*, and *North Georgia Finishing*, *Mitchell*, *Mathews*, and *Mackey* re-affirm and re-emphasize the due-process criteria of the former opinions. Furthermore, *Mitchell*, *Mathews*, and *Mackey* teach that, given the circumstances of *Sniadach*, *Fuentes*, and *North Georgia Finishing*, a seizure of property without a prior hearing is even more compellingly unconstitutional where: (vi) the creditor has no current legal interest in the property seized; (vii) the necessary proofs involve a variety of complex matters, with possibly critical reliance on the credibility and veracity of witnesses, rather than resting on objective facts within the knowledge of a governmental official; (viii) the party whose property is seized lacks reasonable access to the evidence; (ix) there is no immediate, independent review of the seizure by a detached public offi-

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[49] 443 U.S. 1, 13 (1979).

[50] *Id.* at 13-16.

cial; and (x) the applicable statute denies awards of damages or attorneys' fees in the case of a wrongful seizure.[51]

Especially important here is that in every decision from *Sniadach* through *Mackey* this Court *never* held that a governmental deprivation of property satisfies the Due Process Clause without some reasonably reliable *pre*-deprivation fact-finding procedure in which a neutral *governmental* official plays a key investigatory and decision-making role. Moreover, in *Sniadach*, *Fuentes*, and *North Georgia Finishing*, the Court explicitly rejected the notion that the property-owners' supposed rights to *post*-seizure judicial hearings are relevant to the due-process issue.[52]

Where this Court has upheld the procedural-due-process sufficiency of a *post*-deprivation judicial remedy, as in *Parratt* v. *Taylor*, "the loss [was] not a result of some established state procedure"; the loss was "beyond the control of the State"; and "it [was] not only impracticable, but impossible, [for the State] to provide a meaningful hearing before the deprivation".[53] Holding that a *post*-deprivation judicial hearing sufficed as a remedy for a state official's negligent deprivation of an individual's property, the *Parratt* Court explained that,

> [a]lthough [the complainant] has been deprived of property under color of state law, the deprivation did not occur as a result of some established state procedure. Indeed, the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedures. There is no contention that the procedures themselves are inadequate nor is there any contention that it was practicable for the State to provide a predeprivation hearing.[54]

[51] Criteria (i) through (v) appear *ante*, pp. 19-20.

[52] *See* Sniadach, 395 U.S. at 338-39 (opinion of the Court), 343 (Harlan, J., concurring); Fuentes, 407 U.S. at 73-78, 80-84; North Georgia Finishing, Inc., 419 U.S. at 606-08.

[53] 451 U.S. 527, 541 (1981).

Concurring, Justice Blackmun emphasized that

> when it is possible for a State to institute procedures to contain and direct the intentional actions of its officials, it should be required, as a matter of due process, to do so. * * * In the majority of such cases, the failure to provide adequate process prior to inflicting the harm would violate the Due Process Clause. The mere availability of a subsequent tort remedy before tribunals of the same authority that * * * deliberately inflicted the harm * * * might well not provide * * * due process * * * .[55]

Then, in *Logan* v. *Zimmerman Brush Co.*, the Court cited numerous precedents for the proposition that,

> absent "the necessity of quick action by the State or the impracticality of providing any predeprivation process," a post-deprivation hearing * * * would be constitutionally inadequate. * * * That is particularly true where * * * the State's only post-[deprivation] process comes in the form of an independent tort action.[56]

And most recently, *Hudson* v. *Palmer*[57] re-affirmed and applied *Parratt* and *Logan* to deprivations of property caused by the intentional, but unauthorized actions of state officials. "The controlling inquiry", the Court held,

[54] *Id.* at 543.

[55] *Id.* at 546 (separate opinion, joined by White, J.), *citing* Sniadach, Fuentes, and Goldberg.

[56] 455 U.S. 422, 436 (1982). In keeping with the distinction made in cases such as *Mackey*, *Logan* contrasted its situation with one in which a *post*-deprivation hearing was permissible because the deprivation "was based on a reliable pretermination finding". *Id.*, *citing* Barry v. Barchi, 443 U.S. 55, 64-65 (1979). Interestingly, *Logan* arose in Illinois—and the Illinois Supreme Court had held that the State's Legislature had authority to impose whatever "reasonable procedures" it desired to implement a state-created right. *Id.* at 427-28. This Court unequivocally rejected that argument. *Id.* at 431-32.

[57] ___ U.S. ___, 104 S. Ct. 3194 (1984).

"is solely whether the State is in a position to provide for predeprivation process." Although ruling against the complainant because he did "not even allege that the asserted destruction of his property occurred pursuant to a state procedure", the Court emphasized that "a postdeprivation state remedy" does *not* "satisf[y] due process where the property deprivation is effected *pursuant to an established state procedure*".[58]

Thus, *Parratt*, *Logan*, and *Hudson* v. *Palmer* add to the criteria of the decisions from *Sniadach* through *Mackey* the further element that: (xi) a seizure of property without a prior hearing cannot be constitutional where it occurs pursuant to an established state procedure under circumstances in which the government is in a position to, but does not, provide adequate *pre*-deprivation process.[59]

B. Rather than vindicating the arrangement for "proportionate-share payments", the very elements of the Board's and CTU's supposed defense—CTU's alleged "good-faith advance reduction" of the payments, its segregation of the monies in an "escrow" account that it alone controls, and the teachers' burden to prosecute a *post*-deprivation civil action in state court to recover any part of the monies CTU claims they owe—highlight the procedural-due-process bankruptcy of the wage-garnishment scheme.

The Board and CTU do not even attempt to square their wage-garnishment scheme with the principles this Court enunciated in its procedural-due-process decisions from *Sniadach* and *Fuentes* through *Logan* and *Hudson* v. *Palmer*—for the compelling reason that these principles

[58] *Id.* at ____, 104 S. Ct. at 3204 (emphasis supplied). The dichotomy is between "a deprivation of property * * * caused by conduct pursuant to established state procedure", and a deprivation arising from "random and unauthorized action [by state officials]". *Id.* at ____, 104 S. Ct. at 3203 (footnote omitted).

[59] Criteria (i) through (v) and (vi) through (x) appear *ante*, pp. 19-20 and 23-24.

utterly condemn the scheme.[60] Glossing over this omission, the Board and CTU instead pretend that the "combination of protective features for safeguarding objectors' rights—good faith advance reduction, 100% escrow, and the right to judicial review of CTU's determination of the amount of the proportionate share payment—eliminates any conceivable constitutional objection" to the *pre*-hearing seizure of the teachers' wages.[61] In actuality, however, this misnamed "combination of protective features" *is* the procedural-due-process violation, because in operation it effects a *pre*-hearing deprivation of the teachers' property by the government pursuant to an established state procedure, under circumstances in which the government is in a position to, but does not, provide any *pre*-deprivation process, instead relegating the teachers to a *post*-deprivation state-court tort remedy.

The only colorably "protective feature" in the scheme—but one which, on analysis, turns out to be as blackly unconstitutional as the others—is CTU's self-congratulatory "good-faith advance reduction". The "reduction" could be truly "protective" of the teachers' procedural-due-process rights if CTU included within it *all* of the *disputed* portion of the "proportionate-share payments". For, in as much as the teachers dispute the legality of the payments *in toto*, such an "advance reduction" would obviate all constitutional objections of a procedural nature by eliminating the wage-garnishments altogether. As CTU performs the "reduction", though, it is a mere question-begging sham.

To determine the "reduction", CTU subtracted from its total yearly expenditures what it admits are "expenditures for benefits conditioned upon membership [in CTU] and expenditures for political, ideological, charitable and philanthropic causes not related to the collective bargain-

[60] *See post*, pp. 30-33.

[61] CTU/Bd Br. at 18.

ing process", leaving some 95.4% of its expenditures that it claims are "chargeable to non-members" as its costs of "collective bargaining". And, although "reduction" in "union dues" so calculated was only 4.6%, CTU generously "decided to provide an advance reduction * * * of 5% for non-members".[62] Self-evidently, however, its formula is incompetent to calculate a figure that rationally reflects CTU's actual "collective-bargaining" expenses. And even if CTU accidentally arrived at the correct arithmetical result, the "reduction" would nevertheless be irrelevant to the procedural-due-process issue here for decision.

First, no evidentiary—or, the teachers submit, even rational—basis exists for crediting as accurate the formula: TOTAL CTU EXPENDITURES *minus* CERTAIN ADMITTED NON-COLLECTIVE-BARGAINING EXPENDITURES *equals* CTU'S COLLECTIVE-BARGAINING EXPENDITURES. For no evidentiary (or rational) basis exists for believing that CTU's *only* non-collective-bargaining expenses are those that it deigns to expose to public scrutiny; or, from the opposite perspective, that all its other, *un*disclosed expenditures subsidize *constitutional* "collective-bargaining" activities exclusively.[63] CTU's formula simply subtracts an arbitrary subtrahend from an arbitrary minuend, and then pretends that the necessarily arbitrary remainder provides constitutionally meaningful information![64]

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[62] *Id.* at 4 (footnote omitted).

[63] Common experience denies that public-sector unions engage almost exclusively in "collective-bargaining" activities. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231, 234, 236, 237 n.35 (opinion of Stewart, J.), 242-43 (opinion of Rehnquist, J.), 256-57 (opinion of Powell, J.) (1977) (commenting on the political nature and activities of public-sector unions). *See* Local 1625, Retail Clerks v. Schermerhorn, 373 U.S. 746, 753-54 & n.6 (1963).

[64] A correct formula would be: "PROPORTIONATE-SHARE PAYMENT" *equals* A TEACHER'S *PRO RATA* SHARE *of* THE SUM OF ALL ITS EXPENSES THAT CTU PROVES, PRIOR TO ANY WAGE-GARNISHMENT, ARE "COLLECTIVE-BARGAINING" IN NATURE. This formula would constitute what the Board and CTU call a "protective featur[e]", though, only because *it would require for its implementation a* pre-*seizure hearing on the substantive issue of the character of CTU's expenditures.*

Second, even if the formula did fortuitously calculate the substantively correct figure for "proportionate-share payments", it could not obviate the procedural unconstitutionality of the *pre*-hearing wage-garnishments. For the teachers' procedural-due-process rights to a prior hearing do not depend on the likelihood that they will prevail at such a hearing.[65]

Similarly, from the perspective of procedural-due-process, CTU's vaunted "100% escrow" is beside the point. Because CTU might hold the "proportionate-share payments" in "escrow" until some court eventually determines how much CTU is entitled to spend, say the Board and CTU, "there is no risk that objectors will be deprived of their First Amendment liberty without Due Process".[66] But precisely because the Board and CTU have garnished the monies from the teachers' wages and placed them in CTU's "escrow" account without a *pre*-garnishment hearing, and then relegated the teachers to whatever redress a later state-court tort action may (or may not) provide, the "escrow" guarantees that the teachers are deprived of their property—the interim possession and use of their own wages—without due process. That is, *rather than obviating the "risk" of a due-process violation, the "escrow" constitutes that violation.* That the "escrow" may theoretically forefend violations of the teachers' First-Amendment rights is praiseworthy, but irrelevant even if true in practice. For the right to procedural due process does not depend upon a deprivation of property also abridging the victims' First-Amendment freedoms.[67]

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[65] *See* Fuentes v. Shevin, 407 U.S. 67, 87 (1972); Carey v. Piphus, 435 U.S. 247, 266 (1978).

[66] CTU/Bd Br. at 19.

[67] Thus, the Board and CTU are inadvertently correct when they state

Systematic application of the eleven criteria established in this Court's procedural-due-process decisions from *Sniadach* through *Hudson* v. *Palmer* proves beyond doubt what obviously appears on the face of the wage-garnishment scheme: namely, its thoroughgoing unconstitutionality.[68]

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that "the financial terms under which a proportionate share payment is held in escrow are of no constitutional significance; what is critical is that the money is in escrow". *Id.* at 21. For "what is critical" from the perspective of procedural due process is that, through an established state procedure, the government has garnished the teachers' wages, and funnelled the monies directly into CTU's possession, without a *pre*-garnishment hearing. How the monies came to reside in CTU's "escrow" account, not the "financial terms" thereof, frames the root procedural-due-process issue—and, under the circumstances of this case, necessarily decides it in the teachers' favor.

Logically, CTU and the Board can no more avoid an adverse judgment against them on procedural-due-process grounds because of CTU's "escrow" than could two thieves avoid a criminal conviction because one of them had temporarily stashed their loot in a safety-deposit box rather than immediately fencing it.

[68] *See ante*, pp. 19-20, 23-24, and 26. Because they carefully avoid mentioning *Sniadach* and the other procedural-due-process decisions that follow it, the Board and CTU never explicitly claim that the factual situation here presents one of those "extraordinary", "truly unusual", or "limited" cases in which the presumptive requirement of a *pre*-deprivation hearing is out of place. *See ante*, pp. 15-16. But they do argue that "the CTU 100% escrow system has an obvious drawback: the system cuts deeply against the governmental interests that justify requiring proportionate share payments * * * . Until all litigation is resolved, that system deprives the Union of any contributions from objectors, and thus places the entire burden of supporting the Union's collective bargaining activities on the nonobjectors". CTU/Bd Br. at 25. The short answers to this are—

First, CTU can hardly complain with good grace about the "obvious drawback" of a system it itself voluntarily implemented, and which it claims (albeit erroneously) is one (if not the most important) of the "combination of protective features" that supposedly "eliminates any conceivable constitutional objection" to the wage-garnishment scheme. *Id.* at 18.

Second, the record in this case contains not a scintilla of evidence supporting CTU's concern that, "[u]ntil all litigation is resolved," its

1. No extraordinary circumstances compel an immediate, *pre*-hearing garnishment of the teachers' wages to

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"escrow" arrangement "places the entire burden of supporting [CTU's] collective bargaining activities on the nonobjectors". In as much as the costs of CTU's "collective-bargaining activities" are unknown, no estimate of any arguable "burden * * * on the nonobjectors" is possible. Moreover, CTU presents no credible reason why, even if those costs were relatively large, it could not borrow sufficient funds to make up for the teachers' temporary nonpayment, later allocating to them their proper share of the interest-charges as collectible costs of "collective bargaining". And, in any event, CTU's complaint proves too much, in that *every* creditor could object on analogous grounds to procedural-due-process limitations on his ability to invoke state power for immediate seizure and transfer to him of disputed property in a debtor's possession.

Third, even if not fanciful, CTU's financial concerns are irrelevant. For, according to CTU's own legal theory that restricting its use of all "proportionate-share payments" until after a judicial determination of their legitimacy is necessary to obviate possible violations of the First Amendment, the *pre*- or *post*-seizure timing of the hearing is operatively beside the point. Under either procedure, CTU may expend *no* monies until *after* it has prevailed in whole or in part at the hearing.

Fourth, as this Court has noted, rejecting a parallel argument of a public utility, "delayed payment is not nonpayment, and there are means available * * * to recover at least some of the costs of a hearing". Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 20 n.25 (1978).

And fifth, at base CTU's complaint amounts to the inadmissible argument that its private convenience privileges it to disregard the commands of the Due Process Clause. "[C]onvenience alone", however, "is insufficient to make valid what otherwise is a violation of due process of law." Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 647 (1974); *see* Fuentes, 407 U.S. at 90-93. The "100% escrow" system has the same effect on CTU's expenditures as a judicial ruling that no seizures at all may precede a hearing. And, as to the latter situation, this Court has made clear that "a prior hearing always imposes some costs in time, effort, and expense, * * * [b]ut these rather ordinary costs cannot outweigh the constitutional right" to procedural due process. Fuentes, 407 U.S. at 90 n.22. Overwhelmingly immediate *governmental* interests may justify departures from the presumptive procedural-due-process right to a *pre*-deprivation hearing. But in a case such as this, operationally involving only a dispute between an alleged private creditor and private debt-

protect a substantial governmental interest that otherwise would be frustrated.

2. Other than the Board's agreement with CTU to garnish the teachers' wages, no state official (in particular, no judge) participated in the decision to initiate the garnishments, reviewed the factual or legal bases (if any) of CTU's claim before the seizures began, or evaluated the need for *pre*-hearing seizures.

3. No state statute or regulation or provision of the collective-bargaining agreement requires CTU to establish the probable validity of its claims, to make a convincing factual showing, or even to present some evidence beyond mere self-serving assertions before the wage-garnishments commence.

4. No mandate exists in state law for an early hearing on the propriety of the garnishments.

5. No safeguards protect against CTU's abuse of the "proportionate-share-payment" system for its own private gain.

6. When the wage-garnishments occur, CTU has no current legal interest in the monies the Board seizes from the teachers, only an abstract, unperfected claim to some undetermined portion of them.

7. What constitutes CTU's "collective-bargaining" ex-

ors, "care must be taken not to confuse the interest of partisan organizations with governmental interests". Elrod v. Burns, 427 U.S. 347, 362 (1976) (plurality opinion). "[S]tate intervention in a private dispute hardly compares to state action furthering a war effort or protecting the public health." Fuentes, 407 U.S. at 93. Indeed, that the Illinois Legislature made "proportionate-share-payment" arrangements merely *permissible*, but not mandatory, evidences its judgment that immediate seizures of employees' wages are unnecessary—or, that the governmental interest in those payments (whatever it may be) does not significantly exceed the government's general interest in effectuating the collection of private creditors' valid claims from their private debtors.

penses, for which "proportionate-share payments" are allowable, involves difficult questions of constitutional law, and complex evidentiary proofs with possibly critical reliance on the credibility and veracity of witnesses to CTU's operations, rather than resting on settled legal principles and objective facts within the knowledge of the Board.[69]

8. The teachers lack reasonable access to the only complete source of evidence concerning the propriety of CTU's claims: the officials, employees, and organizational records of CTU and its affiliates.

9. No neutral governmental official performed an immediate, independent review of the amount of the wage-garnishments.

10. Illinois law makes no provision for awards of damages or attorneys' fees to the teachers should the wage-garnishments ultimately prove wrongful, or even fraudulent. And,

11. The wage-garnishments occur pursuant to an established state procedure, under circumstances in which the government is in a position to, but does not, provide adequate—or even *any*—*pre*-deprivation process, but by default (if not by intention) relegates the teachers to a *post*-deprivation state-court tort action.[70]

Even more detailed citation of "chapter and verse" from *Sniadach* and succeeding cases proving the unconstitutionality of the wage-garnishment scheme is possible, but would simply bring owls to Athens. For inadvertently, the Board and CTU quite correctly close their brief with the observation that "[w]hat we have just shown is, of course,

[69] *See, e.g.*, Abood, 431 U.S. at 236.

[70] As the Board and CTU frankly admit, the wage-garnishment provision of their collective-bargaining agreement "parallel[s] the Illinois law". CTU/Bd Br. at 4.

sufficient to dispose of the case".[71] Anyone who reads that brief with the teaching of *Sniadach*, *Fuentes*, and so on in mind must immediately infer that the very description and arguments in favor of the wage-garnishment scheme that the Board and CTU present therein are indeed "sufficient to dispose of the case"—*but in the teachers' favor*.[72]

III. A constitutionally proper procedure requires that the Board refuse to garnish the teachers' wages until CTU establishes the cost basis of the "proportionate-share payments" it demands before an appropriate state administrative or judicial agency.

The foregoing analysis corroborates the Court of Appeals' finding that "[t]he procedure * * * adopted in this case [by the Board and CTU] is constitutionally inadequate, and they must go back to the drawing board".[73] Although this Court could simply affirm the Court of Appeals' judgment and remand for the Board and CTU to develop a new, constitutionally adequate procedure on their own, the teachers suggest that the Court exploit the present opportunity to instruct the parties and the lower courts as to the criteria of such a procedure.

A. First, the teachers agree with the Board and CTU that the Board is obviously *not* a suitable state agency to hold hearings on the validity of "proportionate-share payments".[74] Whether an Illinois state court, or perhaps the

[71] CTU/Bd Br. at 24.

[72] The Board and CTU also appear to rely on certain of this Court's summary dispositions that they say are "precedents" for the result they advocate. CTU/Bd Br. at 19 n.13, 26. That the Court considers *this* case worthy of full briefing, oral argument, and opinion, however, renders such reliance bootless. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 500 (1981); Caban v. Mohammed, 441 U.S. 380, 390 n.9 (1979); Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 476 n.20 (1979); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14 (1976).

[73] 743 F.2d at 1196.

[74] *See* CTU/Bd Br. at 23-24.

Illinois Educational Labor Relations Board (subject to judicial review), is the proper forum is a matter of state law, with which this Court should not now concern itself. On the other hand, that CTU's internal arbitration-scheme may not serve as the first, or even any, step in a constitutionally adequate procedure this Court should make clear.[75]

Although the Board and CTU appear to abandon CTU's internal arbitration-scheme as a defense to the teachers' procedural-due-process challenge, relying instead on CTU's (faulty) "100% escrow" and the teachers' supposed right to seek "a final *judicial* determination as to whether the amount of the payment comports with Illinois law and the Constitution", they also note that "the Illinois state courts, as a matter of state law, [might require] invocation of union remedies before adjudicating an objector's claim".[76] No such preliminary "invocation of union remedies" is permissible, however. Even as the teachers' statutory exclusive collective-bargaining representative, CTU lacks authority to require them, through either its unilateral dictate or an agreement it negotiates with the Board, to submit their statutory and constitutional claims to a private arbitrator.[77] And even if such authority existed where the arbitration-scheme satisfied the requirements of procedural due process, CTU could not exercise it where, as here, the scheme is procedurally

[75] In the past, equivocal language in some of this Court's opinions has apparently misled unions into adopting "fair-share-fee" arrangements that, on later plenary review, this Court has held illegal, such as the "rebate program" invalidated in *Ellis*. *See* Ellis, ____ U.S. ____, 104 S. Ct. at 1889-90. A definitive pronouncement on the internal-union arbitration-issue here could obviate protracted litigation in both state and federal courts that is otherwise sure to follow in this and other cases.

[76] CTU/Bd Br. at 22-23, 5 n.5.

[77] *See* McDonald v. City of West Branch, ____ U.S. ____, ____, 104 S. Ct. 1799, 1803-04 (1984); Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 743-46 (1981); NLRB v. Magnavox Co., 415 U.S. 322,

improper on its face.[78]

B. Second, the teachers nevertheless agree with the Court of Appeals that *the Board* must create *some* procedure "for determining dissenters' objections [to the 'proportionate-share payments']".[79] At a minimum the Board should require CTU, as a condition precedent to the Board's garnishment of the teachers' wages, to secure the appropriate state agency's certified final judgment that the requested payments are lawful.

C. Third, the method for calculating the teachers' "proportionate-share payments" cannot lawfully or logically follow CTU's "subtractive" approach. CTU arrives at the "payments" it demands by subtracting from its regular membership-dues what it admits are "expenditures for benefits conditioned upon membership and expenditures for political, ideological, charitable and philanthropic causes not related to the collective bargaining process".[80] Besides assuming without proof that these self-disclosed "expenditures * * * not related to the collective bargaining process" constitute *all* such expenditures CTU makes, CTU's formula also assumes—without proof and contrary to common experience—that *all* its other, *un*disclosed expenditures *necessarily are* "related to the collective bargaining process". Even leaving aside the difficult definitional

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324-26 (1974); Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974); Glover v. St. Louis-S.F. Ry., 393 U.S. 324, 329-31 (1969); Steele v. Louisville & N.R.R., 323 U.S. 192, 206 (1944). The Court of Appeals correctly applied the rationale of these decisions. *See* 743 F.2d at 1195-96.

[78] *See* the Court of Appeals' analysis, which the Board and CTU refrain even from challenging, 743 F.2d at 1194-95. *See also* Schweiker v. McClure, 456 U.S. 188, 195-97 (1982); Marshall v. Jerrico, Inc., 446 U.S. 238, 242-43 (1980); Ward v. Village of Monroeville, 409 U.S. 57, 61-62 (1972).

[79] 743 F.2d at 1197.

[80] CTU/Bd Br. at 4.

problems of constitutional law as to what union activities do and do not "relat[e] to the collective bargaining process", which CTU's approach licenses it to determine unilaterally and without adequate judicial review, this Court must dismiss CTU's "subtractive" methodology as factually non-rational, and therefore impermissible under the Due Process Clause.

The constitutionally correct methodology for calculating "proportionate-share payments" should parallel the "additive" formula federal courts impose on administrative agencies that assess "service fees" against the regulated private parties they specially benefit. In outline—

1. CTU "must *justify* the assessment * * * by a clear statement of the particular service * * * which it is expected to reimburse"[81]—"identify[ing] the activity which justifies each particular fee", and "mak[ing] a public statement of the specific expenses which are included in the cost basis for that fee".[82] This approach is clearly *additive*: "listing the specific expenses which form the cost basis of the * * * fees". CTU may not simply "beg[i]n with its total budget and eliminat[e] * * * activities" it admits are not chargeable; or assess the "total cost" of its operations "all reduced by an unexplained percentage"; or approach "its task backwards, starting with totals and eliminating items rather than selecting certain expenses * * * related in a significant degree to the particular service which is the alleged justification for * * * the fee, and then adding up such items".[83]

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[81] National Ass'n of Broadcasters v. FCC, 554 F.2d 1118, 1133 (D.C. Cir. 1976); Electronic Industries Ass'n, Consumer Electronics Group v. FCC, 554 F.2d 1109, 1117 (D.C. Cir. 1976); *see* Capital Cities Communications, Inc. v. FCC, 554 F.2d 1135, 1137-38 (D.C. Cir. 1976).

[82] National Cable Television Ass'n, Inc. v. FCC, 554 F.2d 1094, 1100, 1104 (D.C. Cir. 1976).

[83] *Id.* at 1105 (footnote omitted).

2. CTU's "clear statement of the particular service" must include an "explanation of what activities were performed" and "how these activities related to" collective bargaining on the teachers' behalf, with an "explanation of the criteria used in eliminating certain costs and retaining others".[84]

3. Because CTU may demand a "proportionate-share payment" "only for 'those activities that are specifically identified as * * * benefitting'" the teachers, and are "indeed beneficial" to them, it must demonstrate "a sufficient nexus between the * * * service for which the fee is charged" and the teachers, and show that "the service * * * *primarily* provide[s] special benefits to [them]", or charge no fee at all.[85] And,

4. CTU must "show the particular costs * * * assess[ed] against the [teachers] * * * so as to assure them that they are paying only for the specific expenses * * * incurred in connection with" collective bargaining, rather than simply "figur[ing] the total cost * * * for operating * * * and then * * * contriv[ing] a formula that reimburses [it] for that amount", or simply lumping the "[c]osts of * * * generic activities" into its demands for "payments".[86] The proper procedure, in short, is for CTU to "calculate the *cost basis* for each fee assessed".[87]

Given these guidelines, the Board, CTU, and the state

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[84] National Ass'n of Broadcasters, 554 F.2d at 1133; National Cable Television Ass'n, Inc., 554 F.2d at 1105.

[85] National Cable Television Ass'n, Inc., 554 F.2d at 1104; FPC v. New England Power Co., 415 U.S. 345, 349-51 (1974); Public Serv. Co. of Colorado v. Andrus, 433 F. Supp. 144, 152 (D. Colo. 1977); Mississippi Power & Light Co. v. United States Nuclear Regulatory Comm'n, 601 F.2d 223, 230 (5th Cir. 1979).

[86] National Cable Television Ass'n, Inc., 554 F.2d at 1104-05; National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 343 (1974); Mississippi Power & Light Co., 601 F.2d at 231 n.17.

[87] Electronic Industries Ass'n, Consumer Electronics Group, 554 F.2d at 1117 (emphasis retained).

agencies that ultimately assert jurisdiction over the "proportionate-share-payment" problem will have a sound legal basis for developing a procedure that both preserves the teachers' property-rights in the possession and use of their wages and accommodates CTU's claim to reimbursement for its demonstrated "collective-bargaining" expenses on their behalf.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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